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No. 94-1307

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SHONG-CHING TONG,
Petitioner,

vs.

FIRST INTERSTATE SERVICES COMPANY,
WEBB EDWARDS, WILLIAM MURIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Is petitioner's petition for writ of certiorari untimely because he failed to file a timely petition for rehearing with the Ninth Circuit Court of Appeals?**

2. **Does petitioner's petition state sufficient grounds to grant a writ of certiorari?**

PARTIES TO THE PROCEEDING

The parties to these proceedings are petitioner and plaintiff Shong-Ching Tong, and respondents and defendants First Interstate Bancorp, sued erroneously as First Interstate Services Company, Webb Edwards, and William Murin. There are no parent companies or non-wholly owned subsidiaries to be identified under Supreme Court Rule 29.1.

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JURISDICTION

Because of petitioner's failure to timely file his petition for rehearing in the Ninth Circuit Court of Appeals, this petition for writ of certiorari is untimely. The deadline for filing this petition for writ of certiorari expired on November 23, 1994, and this petition was not sent to this Court until January 17, 1995.

This Court has informed counsel for respondents that it was setting February 1, 1995 as the filing date of this petition, and that respondents' time to file a brief in opposition would run from that date.

STATUTES AND RULES

Supreme Court Rule 10.1

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Supreme Court Rule 13.4

The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in *banc* pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

Supreme Court Rule 29.1

Any pleading, motion, notice, brief, or other document or paper required or permitted to be presented to this Court, or to a Justice, shall be filed with the Clerk. Every document, except a joint

appendix or brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a list naming all parent companies and subsidiaries (except wholly owned subsidiaries) of each corporation. This listing may be done in a footnote. If there is no parent or subsidiary company to be listed, a notation to this effect shall be included in the document. If a list has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need to be included in the document currently being filed.

Federal Rule of Appellate Procedure 25(a)

Filing. Papers required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and thereafter give it to the clerk. A court of appeals [illegible] permit papers to be filed [illegible] means, provided [illegible]

consistent with standards established by the Judicial Conference of the United States.

Federal Rule of Appellate Procedure 40(a)

Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

STATEMENT OF THE CASE

While First Interstate Bancorp, sued erroneously as First Interstate Services Company, Webb Edwards, and William Murin ("First Interstate") dispute the allegations and argument contained within Mr. Tong's statement of the case, First Interstate will not burden the Court with a recitation of the facts of this case.

Instead, First Interstate simply points out that on August 25, 1994, the Ninth Circuit Court of Appeals affirmed the district court decision dismissing plaintiff's complaint. Mr. Tong then filed a petition for rehearing by the court of appeals on September 12, 1994--a petition that was denied by the Ninth Circuit Court of Appeals on October 19, 1994. Mr. Tong then waited until January 17, 1995 to send this petition for writ of certiorari to the Court--a petition that this Court accepted for filing on February 1, 1995.

I.

MR. TONG'S PETITION FOR WRIT OF CERTIORARI IS UNTIMELY AND SHOULD BE DENIED.

Here, the facts are clear. Mr. Tong's petition for writ of certiorari is untimely. Under the rules of this Court, that petition should be denied.

A. Supreme Court Rule 13.4 Requires This Petition To Be Filed Within 90 Days of the Denial of a Timely Petition for Rehearing.

The Supreme Court rules are explicit and clear. Rule 13.4 provides in relevant part:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is *timely filed* in the lower court by any

> party in the case, the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . . .

Supreme Court Rule 13.4 (emphasis added).

B. Federal Rule of Appellate Procedure 40(a) Requires Petitions for Rehearing To Be Filed Within 14 Days of the Court of Appeals Decision.

Here also, the Federal Rules of Appellate Procedure are clear. Under those rules, any petition for rehearing must be filed with the court of appeals within 14 days of the appellate court judgment. *See* Federal Rule of Appellate Procedure 40(a). Unlike briefs, petitions for rehearing are not deemed filed when mailed. Instead, the petition must arrive at the court by the 14-day deadline. *See* Federal Rule of Appellate Procedure 25(a).

C. Mr. Tong's Ninth Circuit Petition for Rehearing Was Not Timely Filed.

In this case, the Ninth Circuit Court of Appeals affirmed the district court dismissal of Mr. Tong's complaint and entered its judgment on August 25, 1994. *See* the certified copy of the August 25, 1994 memorandum decision lodged with the clerk of this Court in conjunction with this opposition brief. Under the Federal Rules of Appellate Procedure, the deadline for Mr. Tong to file his petition for rehearing expired on September 8, 1994--14 days later.

Here, Mr. Tong failed to file his petition for rehearing until September 12, 1994--4 days after his

deadline expired. *See* the certified copy of the petition for rehearing, filed on September 12, 1994, which has been lodged with the clerk of this Court in conjunction with this opposition brief.

D. Mr. Tong's Petition for Writ of Certiorari Is Untimely Because He Failed To File a Timely Petition for Rehearing in the Ninth Circuit Court of Appeals.

Because Mr. Tong's Ninth Circuit petition for rehearing was filed late, the deadline for Mr. Tong to file his petition for writ of certiorari expired on November 23, 1994. *See* Supreme Court Rule 13.4. As a result, Mr. Tong's January 17, 1994 petition for writ of certiorari was sent to the Court 55 days beyond that deadline, and actually filed with the Court on February 1, 1995--some 70 days beyond that deadline. Under Supreme Court Rule 13.4, Mr. Tong's petition should be denied by this Court.

II.

MR. TONG'S PETITION FAILS TO STATE ANY GROUNDS SUFFICIENT TO GRANT A WRIT OF CERTIORARI.

Under Supreme Court Rule 10.1, a writ of certiorari may be issued in the discretion of the Court where the petition presents important issues of conflicting court decisions or unresolved, important federal questions.

Here, Mr. Tong has presented no evidence that this litigation involves such issues. Mr. Tong's inability

to articulate a sufficient basis for granting this petition is not surprising. In this case, no such basis exists.

Instead of satisfying the mandate of Supreme Court Rule 10.1, Mr. Tong is simply attempting to relitigate issues that have already and conclusively been resolved by both the district court and the Ninth Circuit Court of Appeals.

CONCLUSION

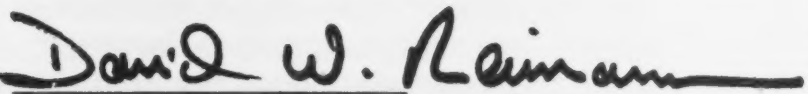
This petition for writ of certiorari was filed either 55 or 70 days late because Mr. Tong failed to file a timely petition for rehearing in the Ninth Circuit Court of Appeals.

Moreover, Mr. Tong is simply attempting to relitigate his claims in this case--this petition does not meet the rigorous standards with which this Court exercises its discretion in considering requests for certiorari.

Mr. Tong's petition should be denied.

DATED: March 2, 1995

Respectfully submitted,
CRAWFORD BLASDELL & REIMANN
DAVID W. REIMANN

By 
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